INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, AS TRUSTEE UNDER INDENTURE DATED THE 21ST DAY OF MARCH 1928, BETWEEN CHARLES L. COBB AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

The Solicitor General, on behalf of Herbert Brownell, Jr., Attorney General, as successor to the Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, New York County, dated July 5, 1955.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, New York County (R. 338–339;

New York Law Journal, May 28, 1954, p. 7) is not officially reported. That court's findings of fact and conclusions of law appear at R. 150–168. Neither the Appellate Division, which affirmed, nor the Court of Appeals, which denied a motion for leave to appeal, wrote an opinion.

JURISDICTION

The first judgment of the Supreme Court, New York County, was entered on June 22, 1954 (Appendix, *infra*, pp. 21–29; R. 169–177). On June 14, 1955, the Appellate Division entered an order of affirmance (Order "A", following R. 343). On remittitur, the Supreme Court entered a further judgment dated July 5, 1955 (Appendix, *infra*, pp. 30–33; "C", following R. 343). On October 6, 1955, the Court of Appeals denied leave to appeal ("B", following R. 343). The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED

By Vesting Order No. 4551, dated January 29, 1945, the Alien Property Custodian vested, under the Trading with the Enemy Act, "All right, title, interest and claim" of various individuals in and to the trust established in 1928 by an indenture between one Cobb and respondent Bank. The New York courts held that by such vesting petitioner, as successor to the Custodian, did not become entitled to receive the income of the trust or to exercise the powers over the trust given by the

indenture to the settlor. On April 6, 1953, petitioner amended the Vesting Order to *res* vest all property held by respondent Bank under said indenture, on a finding that it was property then and prior to January 1, 1947, owned or controlled by nationals of a designated enemy country (Germany).

The question is whether petitioner, by the amendment to the Vesting Order, became entitled to the immediate possession of the trust property.

STATEMENT

The trust involved in these proceedings was created in March, 1928, by an indenture signed by Charles L. Cobb and respondent (R. 21–53).[1] A judgment of the Supreme Court, New York County, entered February 17, 1939, determined that Bruno Reinicke, Jr., was the true creator or settlor of the trust and that Cobb had no interest in the trust and was not the real creator thereof (R. 10, 59, 61; 10 N. Y. S. 2d 420).

The indenture directed that respondent, as trustee, accumulate the income of the trust during the joint lives of Bruno Reinicke, Jr., and his wife Elisabeth, unless it received contrary instructions from the settlor (R. 22). Upon the death of the settlor and his wife, respondent was to divide the trust estate and accumulated in-

[1] Unless otherwise indicated, "respondent" refers to the bank and not to individual respondents.

come into as many equal shares as there should be surviving children of the settlor or descendants of deceased children, *per stirpes* (R. 24). Entire or partial payment of the shares of surviving children was to be made to them when they reached certain specified ages (R. 24–34).[2] Undistributed property held for a deceased child who died without descendants him surviving was to be paid to other descendants of the settlor, or, if none then existed, to the nephews and nieces of Bruno Reinicke, Jr. (R. 35–36).

The settlor reserved the powers: (a) to direct that loans of the trust property be made to him upon conditions prescribed by him (R. 22); (b) to direct that the entire income be paid to him or to another for the benefit of his children (R. 22–23); (c) to direct that one-half of the income be paid to him if he should move to the United States and notify respondent that he intended to become a resident thereof (R. 23); and (d) to vote capital stock owned by the trust (R. 38–39). The settlor also reserved to himself, and to his wife after his death, the powers to guide respondent in all matters of trust policy (R. 39–40) and to postpone or terminate any beneficial interest in the trust (R. 45–46).

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[2] There are three Reinicke children: Bruno Carl Reinicke, Robert Hans Reinicke, and Johanne Maria Reinicke Schaefer (R. 107). They were named as defendants in the trustee's complaint (R. 5) and are respondents here.

On January 29, 1945, the Alien Property Custodian, by Vesting Order No. 4551 (10 F. R. 1652), vested "all right, title, interest and claim" of Bruno Reinicke, Jr., his wife, his three living children, and any other child or children of Bruno, Jr., and Elisabeth Reinicke, and of a number of other persons listed in the Order, in and to the trust (R. 67–72).

After issuing this Vesting Order, the Alien Property Custodian intervened in an action respondent had brought in the Supreme Court, New York County, for construction of the trust indenture and for settlement of its accounts (R. 12). In November, 1946, the Attorney General was substituted for the Custodian as intervening defendant, and he filed a substitute answer asking that respondent be directed, upon the termination of the trust, to deliver to him the shares in the trust of the persons whose interests had been vested, and a decree that he had succeeded to certain powers over the trust (R. 12). The relief requested by petitioner was not granted; on January 30, 1948, a judgment was entered that petitioner was not entitled to receive any income from the trust, that he had not succeeded to the powers over the management and disposition of the trust which were lodged in Bruno Reinicke and his wife, and that he had no power to change the terms of the trust and confer upon himself rights superior to those of his predecessors in interest (R. 211–224 at 222–223).

On appeal, the Appellate Division, one judge dissenting, affirmed (R. 225–226, 229–230) on the ground that "the vesting order indicates no intention to appropriate fiduciary powers". *Chase National Bank of City of New York* v. *McGrath*, 276 App. Div. 831, 93 N. Y. S. 2d 724. The Court of Appeals affirmed (R. 227–228). *Chase National Bank of City of New York* v. *McGrath*, 301 N. Y. 602, 93 N. E. 2d 495.

On April 6, 1953, petitioner issued an order amending Vesting Order No. 4551 (R. 53–56). The amendment recited that after investigation it had been found that Bruno Reinicke, his wife, and the other persons named, and the descendants, heirs, and issue, names unknown, of certain of the persons named were, and had been prior to January 1, 1947, nationals of a designated enemy country (Germany), and that "All property in the possession, custody or control of the Chase National Bank of the City of New York, as trustee" under the 1928 indenture was property which was and prior to January 1, 1947, had been "owned or controlled by, * * * held on behalf of or on account of" said enemy nationals. Accordingly, the amendment declared:

> THERE IS HEREBY VESTED in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt

with in the interest of and for the benefit of the United States.[3]

Thereafter, respondent filed its complaint in this action, alleging, *inter alia,* that one of the defendants, Hans Dietrich Schaefer, a minor, has a vested interest in the trust fund; that another minor defendant has a contingent remainder interest; that other named defendants are minors under the age of 14; and that the vesting of the trust fund in 1953 was illegal. The complaint prayed a judgment approving respondent's account as trustee; that the court determine whether the principal of the trust should be transferred to petitioner; and that, if the court should order a transfer, respondent be allowed to retain certain reserves and that its costs and disbursements be paid (R. 7–58).

Petitioner's answer set up a claim of right arising under the Constitution, laws and authority of the United States, within the meaning of 28 U. S. C. 1257 (3). Petitioner averred that the sole relief and remedy from the 1953 amendment to the Vesting Order was that provided by the Trading with the Enemy Act (40 Stat. 411, 50 U. S. C. App. § 1 *et seq.*), and that the court was without jurisdiction to order the setting up of reserves. The answer prayed a judgment that

[3] The amendment was published in the Federal Register (18 F. R. 2052) and a certified copy was mailed to respondent in a letter dated April 15, 1953 (R. 57–58).

petitioner was entitled to immediate possession of the corpus of the trust and of all accumulations, and ordering respondent to account for and pay over the property to petitioner (R. 59–75).

Answers were also filed by a guardian *ad litem* for Hans Dietrich Schaefer, by the three children of Reinicke, and by a guardian *ad litem* for a number of defendants who were alleged to be minors (R. 76–85, 86–96, 96–97). All opposed the relief sought by petitioner and claimed that the 1953 amendment to the Vesting Order was illegal, contrary to law and to the judgment in the earlier litigation, and unconstitutional.

In an opinion filed at Special Term on May 28, 1954, the New York Supreme Court held that petitioner was not entitled to the relief requested in his answer on the ground that, "Whatever may be the difference between the original and the amended vesting orders the indisputable fact remains that there is at least one person now in being who is a United States citizen and who may well become entitled to the entire principal of this trust upon its termination" (R. 338).[4]

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[4] The court also filed findings and conclusions (R. 150–168) in which it found, *inter alia*, that petitioner had submitted to the jurisdiction of the court in the earlier suit and "a judgment has been made determining that the powers claimed by the Attorney General of the United States as successor to the Alien Property Custodian, over this trust are not vested in him and may not be exercised by the Attorney General" (R. 159); that the defendant Hans Dietrich Schaefer, born in August, 1953, may become entitled to the entire

Accordingly, on June 22, 1954, the court entered judgment directing respondent to retain the principal and accumulated income (R. 169–177). It also ordered the payment of fees to the guardians *ad litem* and payment of the costs and disbursements of the trustee (R. 176–177).

Petitioner thereupon appealed to the Appellate Division, challenging, *inter alia,* the denial of "the relief requested in the answer * * *" (R. 338). Petitioner's claim that he was entitled to the vested property as a matter of federal law was thereafter pressed upon the Appellate Division in brief and argument.[5] On June 14, 1955, that court affirmed without opinion.

A timely motion for leave to appeal was filed in the Court of Appeals. By affidavit and brief filed in support, petitioner again urged his federal claim of right.[6] The motion was denied on October 6, 1955.[7]

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principal of the said trust fund and the accumulated income thereof upon the termination of the said trust (R. 159); that the trust property "is not property payable or deliverable to or claimed by or held for or owned by any person" (R. 160); that the ultimate remaindermen are not ascertainable at this time (R. 160); that petitioner is not entitled to the possession of the corpus and respondent is entitled to continue to hold and administer it under the indenture (R. 161).

[5] A copy of the brief filed by petitioner in the Appellate Division has been lodged with the Clerk of this Court.

[6] Copies of the papers filed by petitioner in the Court of Appeals have also been lodged with the Clerk.

[7] On December 6, 1955, petitioner filed in the Supreme Court, New York County, a protective notice of appeal to

REASONS FOR GRANTING THE WRIT

The action of the New York courts in this case is irreconcilable with controlling decisions of this Court. It denies all effect to the rule, only recently reiterated in *Brownell* v. *Singer,* 347 U. S. 403, and *Zittman* v. *McGrath,* 341 U. S. 471, that when the Alien Property Custodian has *res* vested property under the Trading with the Enemy Act he becomes immediately entitled to possession of the property for administration under the Act. This rule is basic to administration of the Trading with the Enemy Act. It is particularly important that it should be recognized in the courts of New York where there is more litigation under the Act than in any other State.

1. In every relevant essential this case is indistinguishable from *Brownell* v. *Singer, supra,* and *Zittman* v. *McGrath, supra.* In *Singer*, the Alien Property Custodian originally issued an "excess proceeds" vesting order directed to the assets of the Yokohama Specie Bank in New York remaining after liquidation by the State Superintendent of Banks. In litigation subsequent to that vesting, in which the Alien Property Custodian and later the Attorney General (as his successor) appeared as *amicus,* Singer secured a judgment that

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this Court ("D", following R. 343). It appears clear, however, that the case falls under 28 U. S. C. 1257 (3), rather than under 28 U. S. C. 1257 (1), and that certiorari is the appropriate remedy.

he was a creditor of the New York Agency of that Bank. The New York Court of Appeals recognized that Singer's claim as a creditor fell within the federal "freezing" regulations, and it held that he could not obtain payment of his judgment without a license from the federal authorities. *Singer* v. *Yokohama Specie Bank,* 299 N. Y. 113, 85 N. E. 2d 894, affirmed *sub nom. Lyon* v. *Singer,* 339 U. S. 841.

Subsequent to that phase of the litigation, the Superintendent set up on his books a reserve to pay Singer's claim, if and when licensed. Thereafter, the Attorney General issued a turn-over directive requiring the Superintendent to deliver to him the fund so set up as a reserve. The Supreme Court of New York refused to authorize the Superintendent's transfer of the fund to the Attorney General on the grounds that to do so would nullify Singer's judgment and that in the earlier litigation the funds involved had been adjudicated to be non-enemy. *Matter of Yokohama Specie Bank, Ltd.,* 200 Misc. 610, 103 N. Y. S. 2d 228. On appeal, the New York courts affirmed. 280 App. Div. 970, 116 N. Y. S. 2d 926; 305 N. Y. 908, 114 N. E. 2d 469. On certiorari, this Court reversed in a *per curiam opinion,* 347 U. S. 403: "Reversed. *Zittman* v. *McGrath,* 341 U. S. 471."

In the instant case, the Custodian's 1945 vesting order (R. 67–72) was similar to the "right, title, and interest" vesting order in the first *Zitt-*

man case, 341 U. S. 446, and to the "excess proceeds" order in the first *Singer* case, 339 U. S. 841. By his 1945 order, the Custodian seized only the "right, title, interest and claim" of the persons named in that order and stepped into their shoes. *Zittman* v. *McGrath,* 341 U. S. 446; *Kahn* v. *Garvan,* 263 Fed. 909, 912–913 (S. D. N. Y.); *Miller* v. *Rouse,* 276 Fed. 715 (S. D. N. Y.). If the persons named in the order were not entitled to possession, the Attorney General was not.

By the 1953 amendment to the Vesting Order, the Attorney General made a different kind of seizure; he seized the *res* itself, just as was done by the turn-over directives in the second *Zittman* and *Singer* cases. 341 U. S. 471 and 347 U. S. 403. A seizure of a *res* is an entirely different thing from a seizure of the claim of the beneficiaries,[8] and the Attorney General, having determined to take over the administration of the fund, became entitled to immediate possession. "The power of the United States to take and administer the fund is paramount." *Zittman* v. *McGrath,* 341 U. S. 471, 474.

In the instant case, as in *Singer,* the New York appellate courts wrote no opinions. The trial court appears to have rested its refusal to honor the Vesting Order on two main grounds: (a) that

[8] See the two cases of *Zittman* v. *McGrath,* 341 U. S. 446 and 471; *Matter of Viscomi,* 270 App. Div. 732, 736, 60 N. Y. S. 2d 897; *Stern* v. *Newton,* 180 Misc. 241, 39 N. Y. S. 2d 593.

in the earlier litigation, to which the Attorney General was a party, it had been decided "that the powers claimed by the Attorney General of the United States as successor to the Alien Property Custodian, over this trust are not vested in him and may not be exercised by the Attorney General" (R. 159); and (b) that "there is at least one person now in being who is a United States citizen and who may well become entitled to the entire principal of this trust on its termination" (R. 338). Neither of these grounds provides a basis for denying effect to the federal seizure of the *res*.

a. It is unmistakably plain that the earlier proceedings in this case decided only that the Attorney General's 1945 vesting of the "right, title, interest and claim" of Bruno Reinicke did not entitle him to exercise the *fiduciary powers* which the trust indenture gave to the settlor. See R. 155–158, and 276 App. Div. 831, 93 N. Y. S. 2d 724. The earlier decision did not, of course, purport to adjudicate the power of the federal authorities to seize the *res*. That question was not then before the New York courts; the Attorney General did not attempt to exercise the power to *res* vest until he issued the 1953 amendment. An adjudication in 1948 as to the effect of one type of vesting order could not be binding as to the effect of a *res* vesting which was not issued until 1953. *Third National Bank of Louisville* v. *Stone*, 174 U. S. 432; *Utter* v. *Franklin*, 172 U. S. 416, 424; 30 Amer. Jur.

(1940), *Judgments*, § 206; 2 Freeman on *Judgments* (5th ed., 1925), § 712.

Moreover, since the sole relief from a vesting order is that afforded by the Trading With the Enemy Act (Trading With the Enemy Act, Sections 7 (c), 9 (a); *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 487; *Becker Co.* v. *Cummings*, 296 U. S. 74, 79), the Custodian, by submitting to the jurisdiction of the State court in the 1945–1948 litigation for purposes of securing a determination of the interest to which he succeeded by his "right, title and interest" vesting, could not waive the requirement that a challenge to a federal seizure of specific property may be tried only in accordance with the terms of the consent of the United States to be sued. *Minnesota* v. *United States*, 305 U. S. 382, 388–389; *United States* v. *Shaw*, 309 U. S. 495. Cf. *Lyons* v. *Westinghouse Electric Corporation*, 222 F. 2d 184, 188, 196 (C. A. 2), certiorari denied *sub nom. Walsh* v. *Lyons*, 350 U. S. 825.

In *Brownell* v. *Singer*, 347 U. S. 403, the New York courts similarly relied upon the decree antedating the *res* vesting order. *Matter of Yokohama Specie Bank*, 200 Misc. 610, 103 N. Y. S. 2d 228, 231. But this Court reversed the judgment of the State courts and ordered the *res* vesting order enforced.[9]

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[9] In the courts below, the respondents argued that the Attorney General was bound by the 1948 judgment; and the

b. The second ground of the decision—that there is a "person [Hans Dietrich Schaefer] now in being who is a United States citizen and who may well become entitled to the entire principal of the trust upon its termination" (R. 338)[10]—is wholly insubstantial. The Attorney General found in the 1953 amendment to the Vesting Order that the property was "owned or controlled by" the enemy nationals named in the amendment, including Bruno Reinicke, Jr. It is well settled by the decisions of this Court that for purposes of the initial seizure and possession of the property the Custodian's determination of enemy ownership is "conclusive whether right or wrong". *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 53, 56; *Central Trust Co.* v. *Garvan,* 254 U. S. 554, 566, 568; *Becker Co.* v. *Cummings,* 296 U. S. 74, 79; *Stoehr* v. *Wallace,* 255 U. S. 239, 245; *Zittman* v. *McGrath,* 341 U. S. 471, 474. And it is

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Special Term found that in that litigation the Attorney General contended that the principal of the trust should be turned over to him (R. 155–156). But that contention was made on the basis of the 1945 "right, title, and interest" vesting, and did not involve the authority to seize the *res.* Surprisingly, the Special Term, while making the finding just mentioned, excluded the only evidence offered on the point, a copy of the Government's 1948 brief in the New York Court of Appeals (R. 197–199).

[10] Schaefer was held to have a contingent interest (R. 159). The contingency would be: (1) the deaths of Bruno Reinicke and his wife (Schaefer's grandparents); and (2) the deaths of Schaefer's mother and of his two uncles, without issue, all prior to the deaths of their parents (Bruno Reinicke and his wife) or, in the event they survived their parents, their failure to reach age 36.

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equally clear that the claim of Schaefer may be asserted as against the vesting only under Section 9 (a) of the Act. *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 487; *Becker Co.* v. *Cummings, supra,* at 79; *Tiedemann* v. *Brownell*, 222 F. 2d 802, 804 (C. A. D. C.). If his claim amounts to a property right within the Fifth Amendment, it may be set up in a suit under that Section and there only.[11]

2. Two additional arguments made by respondents below may be briefly noticed. One is that with respect to property held in trust the power to vest is limited to the enemy interest. This is merely a variation of the old contention that enemy ownership must be adjudicated before the Custodian is entitled to the property—a contention rejected by this Court as long ago as *Stoehr* v. *Wallace*, 255 U. S. 239, 245. Section 7 (c) authorizes the seizure of "any * * * property", and Section 5 (b) the vesting of "any property"; there is nothing in the language of the Act to suggest a privileged position for property held in trust. The application of the seizure provisions to trusts has uniformly been sustained. See *Central Trust Co.* v. *Garvan*, 254 U. S. 554; *In*

[11] In some instances suits have been maintained under Section 9 (a) by trustees on behalf of remaindermen. See *United States Trust Co.* v. *Hicks*, 16 F. 2d 286 (S. D. N. Y.). In one case the contingent interest sued for was held to be a mere expectancy. *Koehler* v. *Clark*, 170 F. 2d 779, 783 (C. A. 9).

re Miller, 281 Fed. 764, 773 (C. A. 2), appeal dismissed *sub nom. Schaefer* v. *Miller*, 262 U. S. 760; *Central Hanover Bank & Trust Co.* v. *Markham*, 68 F. Supp. 829, 831 (S. D. N. Y.); *Keppelmann* v. *Palmer*, 91 N. J. Eq. 67, 108 Atl. 432, certiorari denied, 252 U. S. 581.

The other argument is that the 1953 amendment to the Vesting Order was a nullity because it was issued after the "end of the war" with Germany and hence was beyond the constitutional power to seize enemy property. But the Joint Resolution of October 19, 1951, which terminated the World War II "state of war" with Germany, expressly reserved from its operation any property or interest which, prior to January 1, 1947, was subject to vesting or seizure under the Trading with the Enemy Act, 65 Stat. 451. The reservation in the Joint Resolution of the authority to vest pre-1947 German property has been held to be within the power of Congress. *Ladue & Co.* v. *Brownell*, 220 F. 2d 468 (C. A. 7), certiorari denied, 350 U. S. 823. Cf. *National Savings & Trust Co.* v. *Brownell*, 222 F. 2d 395 (C. A. D. C.), certiorari denied, 349 U. S. 955. The war power may be exercised by statute or by treaty, and a clause providing for the setting aside of enemy property for subsequent seizure by way of reparations has been upheld in cases arising under treaties of peace. *Klein* v. *Palmer*, 18 F. 2d 932 (C. A. 2); and see *Codray* v.

Brownell, 207 F. 2d 610 (C. A. D. C.), certiorari denied, 347 U. S. 903.

CONCLUSION

The decision below fails to give effect to a seizure of specific property, duly ordered by the Attorney General pursuant to the powers vested in him under the Trading with the Enemy Act. It is in complete and direct conflict with decisions of this Court which have required recognition of the paramount power to make such a seizure. In the light of these decisions, it is respectfully submitted that this petition for a writ of certiorari should be granted and that the judgment below should be summarily reversed without further briefs or argument.

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